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A humanistic turn in Critical Theory of Law:

*the birth of a new conception in Brazilian Legal Theory**

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ABSTRACT:

The *Theory of Realistic Humanism* is a new conception of *Theory of Law* born in Brazil, in the beginning of the XXI century. It is a *theoretical response* to a number of contemporary challenges, whether in the theoretical realm or in the realm of history. In the theoretical realm, it is fundamentally a *Critical Theory* that faces *Traditional Legal Positivism* which, itself, establishes an immediate link between *Law* and *Norm*. In the historical context, it is a *Critical Theory* that responds to contemporary trends of a retreat to *neo-conservatism*, to the all-out exaltation of *legal technique*, to the *dehumanization* of human and social connections. It is within this framework of understanding that the *Theory of Realistic Humanism* derives from *Critical Theory*. This *theoretic model* derives from a few theoretical premises of the *Theory of Law* established in *Between Facts and Norms*, by Jürgen Habermas.

The *Theory of Realistic Humanism* is a model of *Theory of Law* that intend to contribute with *social transformation*. For this theoretical conception the central point of the legal system is the notion of *human dignity*, without requiring an understanding of the *human being in his essence*, nor does requiring a search for the *essence of Law* in its link to *Justice*. It is due to this theoretical quality in its

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general approach to Law, that deals with the social reflectivity of legal norms and content, such as legal texts, emphasizing the idea of an *incomplete human condition*, along with discursive co-dependence between *ego* and *alter* in reaching common judicial objectives, linking these three dimensions to a greater importance of the role of *Law* as a mechanism of *social emancipation from injustice*, social oppression, starvation, misery, social and economic inequalities, which keep *citizenship* in a state of fragility in face of the social power games.

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1. Critical Theory and the Theory of Law in Brazil: a landscape of transformation

Brazilian Theory of Law has long been subject to legal positivism.¹ This was especially true during the 20th century, when the relationship between *Private Law* and the *Normativism* of Hans Kelsen prevailed over *Legal Science*.² It wasn't until the end of the 20th century that a stronger influence of the *linguistic turn* was felt,³ and the *Theory of Law* took on new directions after the end of the civil-military dictatorship (1964-1985). It was during the re-democratization period that Brazil was to experience a veritable boom in the absorption of broader international debates with Philosophical, Sociological and Legal conceptions by John Rawls, Ronald Dworkin, Norberto Bobbio, Alf Ross, Niklas Luhmann, Robert Alexy, Joseph Raz, Jürgen Habermas, Axel Honneth and Rainer Forst.

As a consequence, during the greater part of the 20th century, *Critical Theory* and the *Theory of Law* coexisted as immiscible fluids. *Critical Theory* itself came from the work of the first

¹This text readdresses fundamental arguments in a broader and more complete rendition in form of a book in which the *Theory of Realistic Humanism* is discussed. Vide Bittar, *Introduction to Law: humanism, democracy and justice*, Saraiva, 2018 (Bittar, *Introdução ao Estudo do Direito: humanismo, democracia e justiça*, Saraiva, 2018).

²'A *Teoria Crítica* estreia onde finalizam usualmente os propósitos de *Tradicional Teoria Geral*' - 'Critical Theory begins where the usual objectives of *Traditional General Theory* end' (Fachin, *Critical Theory of Civil Law*, 2nd ed, 2003, p.86).

³Vide considerations of the date of the 1st edition, 1978, *Theory of Legal Norm (Teoria da norma jurídica)*. Vide Ferraz Junior (*Teoria da norma jurídica*, 3.ed., 1997; *Theory of Legal Norm*, 3rd edition, 1997). Vide more recent work, Streck (*Verdade e consenso (Truth and consensus)*, 3.ed, 2009).

Frankfurt School generation (Theodor Adorno; Max Horkheimer; Walter Benjamin; Franz Neumann; Herbert Marcuse; Erich Fromm), strongly Marxist,⁴ keeping its discussion mainly within the areas of Philosophy, Literature and Social Studies through different initiatives⁵ and perspectives.⁶ As stated by Barbara Freitag,⁷ the assimilation of *Critical Theory* was a slow process, at first, in the 60s, more irrational in character (Robert Schwarcz; José Guilherme Melquior)⁸ and then, in the 70s with a rational illuminist movement (Sergio Paulo Rouanet), with the benchmark *As razões do iluminismo (The reasons of Enlightenment)*, 1987.⁹

A more significant contribution came from Jürgen Habermas in the 80s.¹⁰ In this sense, the translation of *Faktizität und Geltung* (Suhrkamp, 1992)¹¹ to Portuguese by Flávio Beno Siebneichler (Tempo Brasileiro, 2003), not only changing the title to *Direito e Democracia: entre facticidade e validade*,¹² but also giving rise to what can be considered a third movement in the assimilation of *Critical Theory*, now amply received within the field of Philosophy of Law.¹³ Therefore, *Critical Theory* enters the 21st century much better equipped than was previously the case.¹⁴ It is at this point that scholars in different Brazilian centers began to pay attention to Jürgen Habermas,¹⁵ Axel Honneth¹⁶ and Rainer Forst.¹⁷

Bringing together the *Theory of Law* and *Critical Theory* is not something simple and this does not happen without an exact understanding of the transformations it causes, with a huge legacy

⁴Matos, *A Escola de Frankfurt: luzes e sombras do Iluminismo (The Frankfurt School: light and shade of Enlightenment)*, 2.ed., 2005.

⁵Freitag (org.), Adorno: 100 anos, in *Tempo Brasileiro* (Adorno: 100 years, in *Brazilian Times*), out.-dez., n. 155, 2003; Löwy, *Walter Benjamin (Walter Benjamin)*, 2005.

⁶Nobre, *A teoria crítica (Critical Theory)*, 2004; Cornelsen, Vieira, Seligman-Silva (orgs.), *Imagem e memória (Image and memory)*, 2012.

⁷About the absorption of *Critical Theory* in Brazil, vid. Freitag, *A teoria crítica: ontem e hoje (Critical Theory yesterday and today)*, 2004, ps. 139-147.

⁸Merquior, *Arte e sociedade em Marcuse, Adorno e Benjamin: ensaio crítico sobre a escola neohegeliana de Frankfurt (Art and society in Marcuse, Adorno and Benjamin: critical essay about Neo-Hegelian School of Frankfurt)*, 1969.

⁹Rouanet, *As razões do iluminismo (The Reasons of Enlightenment)*, 2000.

¹⁰Vide Freitag Freitag, *A teoria crítica: ontem e hoje (Critical Theory: past and present)*, 2004, p. 146.

¹¹Habermas, *Faktizität und Geltung*, Frankfurt am Main, Suhrkamp, 1998.

¹²Habermas, *Direito e democracia: entre facticidade e validade*, Tradução de Flávio Beno Siebneichler, Volumes I e II, 2.ed., Rio de Janeiro, Tempo Brasileiro, 2003.

¹³Maia, *Jürgen Habermas: Filósofo do Direito (Jürgen Habermas: Philosopher of Law)*, 2008; Cruz, *Habermas e o direito brasileiro (Habermas and Brazilian Law)*, 2006.

¹⁴Souza Mattos (orgs.), *Teoria crítica no século XXI (Critical Theory of the 21st century)*, 2007.

¹⁵Nobre, Terra (orgs.), *Direito e democracia: um guia de leitura de Habermas (Law and Democracy: a guide to reading Habermas)*, 2008; Bittar, *Democracia, justiça e emancipação social: reflexões jusfilosóficas a partir do pensamento de Jürgen Habermas (Democracy, justice and social emancipation: jus-philosophical reflections based on the thoughts of Jürgen Habermas)*, 2013.

¹⁶Oliveira, Hrubec, Sobbotka, Saavedra (eds.), *Justice and recognition: on Axel Honneth and Critical Theory*, 2015; Rúrión Melo (coord.), *A teoria crítica de Axel Honneth: reconhecimento, liberdade e justiça (Alex Honneth's Critical Theory: recognition, freedom and justice)*, 2013.

¹⁷Melo, *Crítica e justificação em Rainer Forst*, in *Cadernos de Filosofia Alemã (Criticism and validation in Rainer Forst)* no. 22, jul.-dez., 2013, ps. 11-30.

of positivism in the Brazilian legal culture, among which, and most importantly, the radical gap between the understanding of Law and the critical understanding of Society, whose effects are still felt to this date. Therefore, as stated by numerous authors,¹⁸ the task of closing the gap between the *Theory of Law* and *Critical Theory* is not simple and results, in this respect, in the early 21st century, as a qualitative achievement in terms of reflection in this field in Brazil.

It is within this framework of understanding that the *Theory of Realist Humanism* is born in Brazil,¹⁹ derived from *Critical Theory*, at a time of obscurantist crisis. This theoretic model acts through a gradual process involving intellectual productions, analyses and partial aspects contained in previously published books,²⁰ in previous scientific articles,²¹ and expressed as a new methodology for the *Theory of Law*, which derives from a few theoretical premises of the *Theory of Law* established in *Between Facts and Norms*,²² by Jürgen Habermas, and the tradition that followed in Frankfurt.

2. The Theory of Realistic Humanism and the Traditional Theory of Law

Primarily, the *Theory of Realistic Humanism* is a theoretical response to a number of challenges, whether in the theoretical realm or in the realm of history. In the theoretical realm, it is fundamentally a *Critical Theory* that faces *Traditional Law Theory*, the *Legal Positivism Theory* which, itself, establishes an immediate link between *Law* and *Norm*. In the historical context, it is a *Critical Theory* that responds to contemporary trends of a retreat to *neo-conservatism*, to the all-out exaltation of *legal technique*, to the *dehumanization* of human and social connections, to the *obsolescence* of justice and the exaltation of the *post-human*.

¹⁸Coelho, *Teoria Crítica do Direito (Critical Theory of Law)*, 1991.

¹⁹Vide Bittar, *Introdução ao Estudo do Direito: humanismo, democracia e justiça*, 2018.

²⁰Vide Bittar, *O direito na pós-modernidade e reflexões frankfurtianas (Law in post-modernity and Frankfurthian reflections)*, 2.ed., 2009; *Democracia, justiça e direitos humanos: estudos de Teoria Crítica e Filosofia do Direito (Democracy, Justice and Law: studies of Critical Theory and the Philosophy of Law)*, 2011; *Democracia, justiça e emancipação social: reflexões jusfilosóficas a partir do pensamento de Jürgen Habermas (Democracy, justice and emancipation: jus-philosophical reflections based on the thoughts of Jürgen Habermas)*, 2013.

²¹The main scientific articles published in Brazil, Portugal and in the USA that cover the period between 2005 and 2018: Bittar, *Crise política e Teoria da Democracia: contribuições para a consolidação democrática no Brasil contemporâneo (Political Crisis and the Theory of Democracy: contributions for democratic consolidation in present-day Brazil)*, in *Revista de Informação Legislativa*, Ano 53, no. 211, Julho/Setembro – 2016, ps. 11 a 33; *Modern Reason, Emotion and Justice*, in *XXVII World Congress on the Philosophy of Law and Social Philosophy*, IVR World Congress, Washington, August, 2015; *Diálogo, consciência cosmopolita e direitos humanos: os rumos e limites das lutas identitárias no mundo contemporâneo (Dialog, cosmopolitan conscience, and human rights: directions and limitations of identitarian struggles today)*, in *Revista Direitos Fundamentais e Justiça*, Ano 07, no. 22, Jan./Mar., 2013, ps. 98-123; *Ética, técnica e direitos humanos (Ethics, techniques and human rights)*, *Revista Brasileira de Estudos Políticos, Revista de Pós-Graduação da Faculdade de Direito da UFMG*, n. 103, Julho/Dez., 2011, ps. 139-182; *Violência e realidade brasileira (Brazilian violence and reality)*, in *Katálysis: Revista de Serviço Social, Violência: expressões na contemporaneidade (Review of Social Service, Violence: expressions in the world today)*, v. 11, n. 2, p. 214-234, jul./dez. 2008; *A discussão do conceito de direito: uma reavaliação a partir do pensamento habermasiano (The discussion of the concept of Law: a reassessment based on the thoughts of Jürgen Habermas)*, in *Boletim da Faculdade de Direito da Universidade de Coimbra*, n. 81, 2005, ps. 797-826.

²²Differently from philosophy, the theory of Law may not flout the results of the internal nexus between Law and political power, especially the issue of legal permission to use legitimate force on behalf of the State' (Habermas, *Law and Democracy*, vol. 01, 2003, p. 244; *Direito e democracia*, vol. 01, 2003, p. 244).

It is due to this theoretical quality in its general approach to Law,²³ that deals with the social reflectivity of legal norms and content, such as legal texts, emphasizing the idea of an *incomplete* human condition, along with discursive co-dependence between *ego* and *alter* in reaching common judicial objectives, linking these three dimensions to a greater importance of the role of Law as a mechanism of *social emancipation from injustice*, social oppression, starvation, misery, social and economic inequalities, which keep *citizenship* in a state of fragility in face of the social power games.

Thus, as a *Critical Theory*, generated within the context of Brazilian peripheral modernity, the *Theory of Realist Humanism* assumes *universal validity* – while assuming a *humanizing vision* of judicial relations and of the role of regulatory institutions of law – and of *local utility* – while adapted to concrete human necessities, as well as local dynamics and empirical realities. Actually, this is what distinguishes the *Theory of Law* from the *Philosophy of Law*, while the *Theory of Law* is involved in empirical legal determinations, responsible for promoting reciprocal adjustments between *modernization* and *justice*, and for leading to the reduction of inequalities, injustice, violence, invisibility and oppression.²⁴ Bearing in mind the statements of Joseph Raz regarding the *Theory of Law*, an attempt is made to explain what Law is and, further, how Law works.²⁵

The *Theory of Realistic Humanism* is a model of *Theory of Law* that allows for a *universal reflection* while delivering *local action*, in addition to *discursive thought*, contributing to *social transformation*. In possession of a pragmatic-discursive *universality*, and working through democratic institutions in participative actions towards justice and towards the humanizing of legal procedures, the *theoretical model* does not require an understanding of the human being in his essence, nor does it require a search for the essence of Law in its link to Justice.

3. The humanistic and democratic turn in Brazilian Theory of Law

The *Theory of Realist Humanism*, while it is a *Humanistic* and *Critical Theory* in terms of Law, does not express a critical stand in terms of the place of Law, but offers conditions to *Science of Law* to become more critical and to revise its own procedures, practicing, in essence, an epistemological self awareness. The *humanistic* and *democratic turn* of the *Theory of Law*, therefore, is a step forward in the already well absorbed and understood linguistic turn that is present in local concepts of Law, and is

²³‘It is distinct from legal dogmatism through the drive to produce a legal order theory in its entirety.’ (Habermas, *Between Facts and Norms*. Vol. 01, 2003, p. 244; *Direito e democracia*, vol. 01, 2003, p. 244). “Von der Rechtsdogmatik unterscheidet sie sich durch den Anspruch, eine Theorie der Rechtsordnung im ganzen zu leisten” (Habermas, *Faktizität und Geltung (Between Facts and Norms)*, 1998, p. 241).

²⁴‘... the Theory of Law, as opposed to jus-philosophical theories, moves along the limits of concrete legal orders’; ‘...a teoria do Direito, ao contrário das teorias jusfilosóficas de justiça, movimenta-se nos limites de ordens jurídicas concretas” (Habermas, *Direito e democracia, (Between Facts and Norms)*, vol. 01, 2003, p. 243-244). “Anders als philosophische Theorien der Gerechtigkeit bewegt sich die *Rechtstheorie* innerhalb der Grenzen konkreter Rechtsordnungen” (Habermas, *Faktizität und Geltung*, 1998, p. 240).

²⁵‘Therefore, as here understood, a theory of law provides an account of the nature of law. The thesis I will be defending is that a theory of law is successful if it meets two criteria: First, it consists of propositions about the law which are *necessarily* true, and, second, they *explain* what the law is” (Raz, *Between authority and interpretation*, 2009, p. 17).

instrumental in charting new routes for the transformation of how Law is understood, proposing to deepen the revisionist idea of perfecting the *Enlightenment* contained in modern Law; promote a *realistic perspective* in legal self criticism, linked to real social dimensions of justice, with concrete situations in the midst of injustice and violence; to foster forms of emancipation, taking into consideration the potential of Law, in tandem with other social forces; to seek and promote *clarification* in the sense of the *Aufklärung*, through the practice of *social, democratic and republican humanism*; reclaim the notion of *justice as an axiological centripetal force* of the culture of Law; stand against the technocratic processes of life, against the colonization of the world of life and against the instrumentalization of Law, as a practical experience based on repetitiveness; emphasize the notion of *human dignity* adopting it as the cornerstone of Law; reinforce the importance of the struggle for the effectiveness of fundamental rights and for the *consolidation of democracy* within the Brazilian context; to identify forms of promoting citizenship and social justice in *constructive social transformation* and a *qualitative change in inclusive practices* of institutions; to grasp within communicative, dialogical, participative and democratic reason, the political venue for legitimate and sovereign social control of power; to value *de-repression*, where freedom is suffocated, and *autonomy* where heteronomy has become the rule, to awaken the analysis with sights set on the *history-of-tomorrow* (or to the budding transformation processes developing on *present-day frontiers*) rather than to look at the *past records*.

The Theory of Realist Humanism is critical of the uprooting that the *Traditional Theory of Law* caused in the manner of conceiving Law in terms of empirical, concrete and structural challenges of justice in every-day life. Therefore, the *Theory of Realist Humanism* is built on the foundations of *social, democratic and republican humanism*, according to which, the *Science of Law* should: (i) cultivate Law as an exercise of active responsibility in terms of citizenship and social justice; (ii) accept and understand the *Science of Law* in its condition of being *incomplete*, in the midst of all other human sciences, always in need of interdisciplinary subsidies from *Social Science*, maintain *cross-border* curiosity in human studies, permanently cultivate a critical outlook and a revision of *methods* of legal knowledge, promote an *open and wide* perspective about human beings, in the context of social existence; (iii) foster an *integrated vision* concerning the multiple factors that work together to define the human condition, to employ the law as a broader means of ensuring *social justice* and *human dignity*.

The *Theory* calls on judicial actors to reflect and to exercise innovative skills in legal procedures, in their independent intellectual stance, in the originality of creation and in responsible and accountable actions in the practice of Law and, therefore, practice a form of humanism aimed at *humanizing relations, interactions and institutions* that connected to Law.

In its constructive synthesis, the *Theory of Realist Humanism* is not all theory or all practice, but a theory that aims to become practice, or better yet, a theory that does not see itself as superior to practice, that does not merely consider practice as accessory, a theory that is not opposed to practice, which is its driving force. This is the case since *social action* is the focus of the *Theory of Law*, with the task of promoting justice as its great challenge. Especially in the sphere of the *Theory of Law*, critics must understand: the *theory* as a privileged moment to focus on *practice*. This is important since, among ‘us,’ ‘our vision of the world,’ and ‘reality’ allows for a myriad of factors, such as, pre-concepts,

concepts, categories, approaches, interpretations, world perspectives, cultural systems, blocking 'direct access' to reality.

So, without any metaphysical assumption, the *Theory of Realist Humanism* originates from a central empirical premise, which is that it has no 'direct access to reality,' as such. In fact, what is viewed as 'reality' is not, as a 'totality,' accessible to single-disciplinary knowledge. Each 'portion of reality' illuminated by Science is reassembled with the help of a multitude of efforts from each field of knowledge and *interconnected* to form a 'reality framework.' It is within this 'reality framework' that every-day Law is practiced. For the jurist it is useful since it involves working with legal acts and facts, making single and socially relevant decisions, fostering social changes, always bearing this melded 'reality framework' on which legal actions are expressed in the dimensions of the 'world of life' (*Lebenswelt*).²⁶

Turning to 'humanism' seeks the complement to knowledge which faces reality's *multichromatic complexity* in an interdisciplinary approach and, there, offer a theoretical view of Law that favors the development of a *critical humanizing view* and a grasp of social context. Therefore, a jurist must come from a *reflective, critical and humanistic* background in view of elements of our world that surround the universe of Law, with the *Theory of Law* providing a methodological framework for the mediation between activities in the *Science of Law* and the *practice of Law*.

4. Theory of Law and the challenges faced by the Science of Law

When questioned about why Law must have a *Theory of Realist Humanism*, it is clear that Law regulates *social conflicts, moral issues, interests of justice and casuistic circumstances* within society and, in order to handle contradictions between theory and practice, between the culture of Law and social reality, underdevelopment and the modernizing process, a broader conceptual framework is better equipped than the *Traditional Theory of Law*. It is a worthy contribution if taken seriously, to avoid the isolation of the culture of Law from the factors that compose the 'social totality,' so that the culture of Law does not become stagnated in the fetishized cult of '*juridical form*' and '*static legality*' and, finally, so that the culture of Law may adapt to '*social changes*' and their ensuing challenges.

So, *realist humanism* becomes a *theoretical attitude* (general vision, universal attitude) in the approach to Law which allows for the development of links with Social Sciences (Anthropology, History, Philosophy, Political Sciences, Economics, Sociology, Psychology, Semiotics) to attend to the needs originating from *concrete reality* in which partner citizens of Law are found (localized reality, localized knowledge). This approach helps to maintain the double role of theory, dealing with *abstract concepts*, while facing *empirical* challenges, overcoming simultaneously manifestations of shortcomings in *sociological* and *rationality* issues.

²⁶Habermas, *Direito e Democracia (Between Facts and Norms)*, vol. 1, 2003, p. 43.

Thus, the *positivity* of Law demands from the jurist a *holistic, critical and humanistic knowledge* that is capable of encompassing the *positivity of Law* – as an aspect of its *universality* - with characteristics and challenges and local contexts of anthropology, sociology, politics, economics and culture, as an aspect of its *contextuality*.²⁷ Tension between the *form of Law* and the *contextuality of the incidence of Law* is not eliminated here, but is viewed as a distinction in the perspective of the *Theory of Realist Humanism* in facing the challenge of ruling and caring for the rights and dignity of each *human being*, in their situated, circumscribed, contextualized, cultural, social, economic and historical humanity.

The *Theory of Realist Humanism* can be understood as a *theoretical and transdisciplinary and dialogical attitude*, in view of the ethics of this theory and as a *methodological attitude*, considering the universal / local dichotomy, seeking to mobilize the Law to carry out its social function with Justice.

Furthermore, from an epistemological point of view, the *Theory of Realist Humanism* recognizes that the *Theory of Law* cannot be effective without an interdisciplinary approach, due to the *incomplete* nature of individual sciences in providing a broader explanation of Law, being carried out, therefore, through interdisciplinary dialog that provides, within a gradual structuring process of the *Theory of Law*, a conceptual approach through convergent lines, concepts and theories, applied locally to allow for a normative self-construction.

However, it is important to emphasize that the central point of the *Theory of Realist Humanism* is the attitude of keeping the traditional *Critical Theory* alive with its emancipatory ideals, reconnecting two aspects that had been *disconnected* by the *Traditional Theory of Law*, on the one hand, and the institutionality of Law and, on the other, society's emancipation. Therefore, in the approach to the *Theory of Law*, there is a distancing from *legal naturalism*, since it does not deal with the notion of human nature or with contractualist presuppositions (Jean-Jacques Rousseau),²⁸ of *legal positivism*, for not exhausting Law in state legislation (Hans Kelsen),²⁹ of *realism* (Alf Ross),³⁰ for not being able to see in simple facts and in the decisions of judicial authorities within the legal system sufficient empirical explanations about Law, of *idealism* (Immanuel Kant),³¹ for not seeking in transcendence the conditions for the carrying out of Positive Law, of *functionalism* (Niklas Luhmann),³² for not adopting, within judicial security the only element to guide the social function of the *legal system*.

²⁷Vide Bittar, Crise política e Teoria da Democracia: contribuições para a consolidação democrática no Brasil contemporâneo (*Political Crisis and the Theory of Democracy: contributions for the democratic consolidation in present-day Brazil*), in *Revista de Informação Legislativa*, Ano 53, no. 211, Jul./Set., 2016, ps. 11 a 33. About the relation between Facts and Norms, vide Habermas, *Direito e democracia (Between facts and norms)*, 2003. About the relation between universalism and contextualism, vide Forst, *Contextos da justiça: filosofia política para além de liberalismo e comunitarismo (Contexts of Justice: Political Philosophy beyond Liberalism and Communitarianism)*, 2010.

²⁸Rousseau, *Du contrat social (The Social Contract)*, 1992.

²⁹Kelsen, *Teoria pura do direito (Pure Theory of Law)*, 4ª.ed., 1976.

³⁰Ross, *Direito e justiça (On Law and Justice)*, 2000.

³¹Kant, *Fundamentação da metafísica dos costumes (Fundamental Principles of the Metaphysics of Morals)*.

³²Luhmann, *Sociologia do direito (A Sociological Theory of Law)*, vol.I, 1983; vol. II, 1985.

At this point, it is important to verify that the *Realistic Humanism* emerges as a Latin American perspective on *Critical Theory*. The *Theory of Realistic Humanism*, because it contains a realistic proposal, approaches the perspectives of *Legal Realism*, without, however, exactly matching the conceptions of *american realism* (Karl Llewellyn, Jerome Frank, Carl Olstein, H. Oliphant), *scandinavian realism* (Axel Hägerström, Alf Ross), the *genovese realism* (Giovanni Tarello, Ricardo Guastini) and the *legal realism* that underpinned the formation of the *Critical Legal Studies Movement* (Roberto Mangabeira Unger, Elisabeth Mensch, Morton Horwitz, Mark Tushnet and Duncan Kennedy). As for the latter, it will share the critique of Traditional Theory, while it will differ from the influence matrix of Critical Theory, considering the actuality of the models of Jürgen Habermas and Axel Honneth, differing in some of its aspects, concepts and categories.³³

5. The notion of humanism and the internal definition of Theory of Realistic Humanism

The *Theory of Realistic Humanism* is a *Humanistic and Critical Theory* for Law,³⁴ since Law occurs in society. For a democratic view of society, a critical stance is necessary.³⁵ In fact, from the point of view of modern society, the critical view is structured, starting from socializing processes themselves, in the sense that modern institutions are always under scrutiny, as states Agnes Heller,³⁶ seeking to improve the reach of justice and, with it, moral, intellectual, social, economic and political progress.

Along this line of thought, a *Critical Theory* that is up to date with current philosophical and sociological debates does not need to choose between the prevalence of ‘private’ over ‘public’ values

³³A este respeito, consultar: Fischl, Some realism about Critical Legal Studies, *University of Miami Law Review*, Miami, 41, 1987, ps. 505-532; Godoy, O *Critical Legal Studies Movement* de Roberto Mangabeira Unger, in *Revista Jurídica da Presidência*, Brasília, v. 8, n. 82, 2007, dez.-jan., ps. 49-63; Tushnet, Some current controversies in Critical Legal Studies, in *German Law Review*, 12, 01, 2011, ps. 290-299; Unger, *The Critical Legal Studies Movement: another time, a greater task*, 2015; Unger, The Critical Legal Studies Movement, in *Harvard Law Review*, v. 96, no. 3, 1983, ps. 561-675.

³⁴V. Mendonça, *Ensino jurídico e educação em direitos humanos: como o estudo de casos pode alavancar uma visão realista e humanista para o Direito*, in *Revista Interdisciplinar de Direitos Humanos*, vol. 6, no. 01, Bauru, OEDH, UNESP, jan.-jun., 2018 (10), ps. 251-255.

³⁵Said, *Humanismo e crítica democrática (Humanism and democratic criticism)*, 2007, p. 42.

³⁶Na modernidade, a justiça dinâmica é generalizada de três maneiras. Primeiro, nenhuma instituição está fora dos limites: cada uma delas pode ser testada e considerada injusta ou injustificada. Segundo, qualquer um pode levantar uma reivindicação deslegitimada. Terceiro, todos os argumentos em favor de uma alternativa podem recorrer à liberdade e à vida como valores gerais (universais). Na verdade, esses três aspectos se desenvolvem em conjunto, e sua combinação final indica que se chegou ao ponto de não-retorno no surgimento inicial (originário) do ordenamento social moderno”; ‘In modernity, dynamic justice is generalizes in three manners. First, no institution stands outside the limits; each can be tested and deemed unjust or unjustified. Second, anybody can make a non-legitimate claim. Third, all arguments in favor of an alternative can appeal to freedom and to life as universal values. In fact, these three aspects work together, and their final result indicate a point of no return in the initial appearance of modern social order.’ (Heller, Féher, O pêndulo da modernidade (*The Pendulum of modernity*), in *Tempo Social, Revista de sociologia da USP*, São Paulo, 6 (1-2), 1994, p. 53-54).

– a dichotomy that dominated the 20th century – bringing disastrous political consequences in the formation of autocratic governments. *Humanistic Realism* contemplates the *complementary* aspect between ‘private values’ and ‘public values,’ establishing an ideal point of transition and balance between these two cogenerated intertwined dimensions in the context of democracy and human rights.³⁷

It is in this sense that the *Theory of Realistic Humanism* preserves the notion of concrete utopia within its legal application, seeking to work along an *emancipatory realism* venue, but avoiding any relapse into dystopian utopia, or a relapse into the *historical authoritarian* and *anti-democratic regimes* that characterized historical *political authoritarianism* of the past. This means that *Humanistic Realism* maintains the notion that *emancipation* may and must occur through Law, in tandem with other social forces, seeking to maximize justice in society, preserving legality, liberty, diversity, equality, redistribution, recognition, solidarity, democracy and human rights, not as individual options, but as intertwined values of the culture of Law applied to Brazilian reality.

However, when the term ‘humanism’ is mentioned, a semantic ‘abyss’ seems to open up due to numerous theoretical trends in the past claiming it. One can question what is meant by ‘humanism’, since many have come to pass. This is a *realist humanism*, focused on a *moral, social, political* and *qualitative transformation* of Brazilian reality, seeking *emancipation* from *social injustices, from starvation, misery, ignorance, cultural and spiritual poverty* that keeps citizens as fragile and subservient hostages. *Realistic humanism* understands the importance of ‘integral human development’³⁸. In this line of thought it is not the ‘capital’ that is the center of the world, but the *integral development of the human being,*’ considered in its various dimensions.

It is also understood that, if the Law does not possess all conditions, instruments and the responsibility to overcome these issues, it still possesses conditions to contribute. This is where Law fits in since it is viewed as a complex thought matrix, intrinsic to the *fabric of social life*, along with economy, labor, politics, culture, ideologies, institutions, organized social groups. In other words, Law is *co-determined* by these factors which are inextricable among themselves, and is not ruled exclusively by any of them.

Intrinsic to *humanism* is the drive to *expand* horizons beyond *social pathologies* and *technocratic distortions*, such as *legalism, technicism, economicism, irrational rationalism, ideologism*, that block *understanding, dialog* and *emancipation*. This expansion implies in ‘observing the world’ while safeguarding bridges to studies of Anthropology, Psychoanalysis, History, Philosophy, Logic, Political Science, Economics, Ethics, in an effort to better grasp the limitations of our own horizons in understanding Law from within the culture of Law. The culture of Law needs to learn how to better engage in dialog with its surrounding areas.

This *expansion* also allows for going beyond the modern trend of simply betting on reason (*Vernunft*), to grasp the complex *dialectic union* of these factors that serve the purposes of Law, while preserving them against: instrumental reason (*Instrumentellen Vernunft*), which may lead to the

³⁷Habermas, *Direito e Democracia* (Between Facts and Norms), vol. 1, 2003, p. 116 e ss.

³⁸A respeito, consulte-se <http://pnud.org.br>. Acesso em 04/12/2015.

irrationality of passion, contempt for criteria, political will, the willingness to decide, arbitrary decisions, pure politics that can turn into games, foreign to the precepts of justice to ravage real people, principles and needs. Since every theory resorts to the notion of *reason* (*Vernunft*), let's take a closer look at the critical view of the Frankfurt School, from Horkheimer to Adorno, from Adorno to Habermas, from Habermas to Honneth, in the self-critical notion of *reason* which normally guides Science, to 'read' the idea of *reason* (*Vernunft*)³⁹ including considerations of ensuing pathologies and irrationalities⁴⁰. Therefore, when invoking the notion of *reason*, its correlations must be considered, meaning: political reason and irrationality (the power to decide, taking politics to extremes, political exceptions, corruption, the misappropriation of power); instrumental and economic reason and irrationality (economical power, monopolies, concentration, domination, exploitation, alienation, the perpetuation of power, the promotion of inequalities; cultural reason and irrationality ('cordiality', '*jeitinho*' (a Brazilian cultural way of bend the rules) and discourse and communicative reason and irrationality (manipulation, distortions, intimidation, coercion, alienation).

Therefore, this conception of *humanism* understands that Auschwitz symbolizes the *specter of the modernity project*, in face of which the *Theory of Law* must take heed to avoid the resurrection of barbarism. Thus, *humanism* is the defense against the *irrationality of the instrumentalization of the human condition*. In this sense, we must guard against certain *historical deviation of instrumental modernity*, certain *social pathologies* of contemporary life, certain *self-illusions of the theory* that are foreign to social reality. It is in this *more modest* manner that *realistic humanism* presents itself, *less hyperbolic*, to the turbulent grounds of contemporary life, as a *social, democratic and republican humanism*.

In this sense, the *Theory of Realist Humanism* is best described as a specific understanding of *humanism* which is, *social, democratic and republican*. It is at the core of this theoretical doctrine since it interprets Law differently from better known traditional trends, such as the *Theory of Law*, legal positivism, legal naturalism, idealism, materialism. Hence, it is viewed as a theoretical manner in which to *humanize* Law, shielding it from engaging in excessive legal technicalities, and reestablishing emancipation as a *social commitment* of Law, preventing it from becoming a mere systemic language.

Conclusions

³⁹Tiburi, *Uma outra história da razão (Another story of reason)*, 2003.

⁴⁰“No contexto de teoria social, podemos falar em ‘patologia social’ sempre que o relacionamos com desenvolvimentos sociais que levam a uma notável deterioração das capacidades racionais de membros de sociedade ao participar da cooperação social de maneira competente” - ‘In the context of social theory, we can mention ‘social pathology’ whenever we speak of social developments that lead to a significant deterioration of the capacity to think rationally of members of a society when participating competently in social cooperation” (Honneth, *O direito da liberdade (Freedom's Right)*, 2015, p. 157). Further on: “Nessa medida, as patologias sociais apresentam o resultado de violação de uma racionalidade social materializada como ‘espírito objetivo’ na gramática normativa dos sistemas de ação institucionalizadas” - ‘in this measure, social pathologies present the results of the violation of a materialized social rationality as the ‘objective spirit’ in normative grammar of institutionalized action systems.’ (Honneth, *O direito da liberdade (Freedom's Right)*, 2015, p. 209).

The *Theory of Law* is in motion in Brazil, due to the extensive transformations that have occurred in the last four decades. Throughout this period, there have been agreements and disagreements with the *Critical Theory*. The most recent development heralds a new theoretical paradigm, the *Theory of Realistic Humanism*. The introduction of this new theory within the scope of the Brazilian debate concerning *Theory of Law* follows this *linguistic turn* towards a *realistic* and *democratic turn*.

In its epistemological boundaries, the *Theory of Realistic Humanism* constitutes a *Theory of Law*, as a comprehensive answer to empirical legal orders, based on the conception of a *realistic, democratic* and *republican humanism*. Its introduction into Brazilian reality is a response to the challenges of the Brazilian modernization process, strengthening the institutions of Law, seeking to promote participatory democracy and connecting Law with Justice, as a historical process of social transformations. The theory presents perspectives for emancipation and justice, with *legal formality* to realise *legitimate social interests*, and *human incompleteness* as a premise for goals achieved through social exchanges.

In this perspective, the *Theory of Law* can be improved and deepened, based on the contributions of *Critical Theory*, which reflects the latest tendencies of the Frankfurt School. The work of Jürgen Habermas, Axel Honneth and Rainer Forst leave fundamental marks in the characterization of this concept of *The Theory of Law*. If the scenario of predominance of the Traditional *Theory of Law* seems to have been exhausted in Brazil, the *Theory of Realistic Humanism* offers the possibility, in the midst of the post-positivism, post-modernism and post-humanism debates to provide a *methodological alternative*, not to be confused with idealism, legal naturalism, positivism, or with functionalism. This theoretical model reacts, in its inception, to Brazilian reality as a theoretical paradigm capable of providing a *theoretical attitude* that engages citizens in its local dimension, while promoting the universality of the practices of humanization of Law.

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